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# Supreme Court of the United States

OCTOBER TERM, 1919.

No. 171.

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REDERIAKTIEBOLAGET ATLANTEN,  
*Petitioner (Respondent below),*  
*against*  
AKTIESELSKABET KORN-OG FODERSTOF  
KOMPAGNIET,  
*Libelant.*

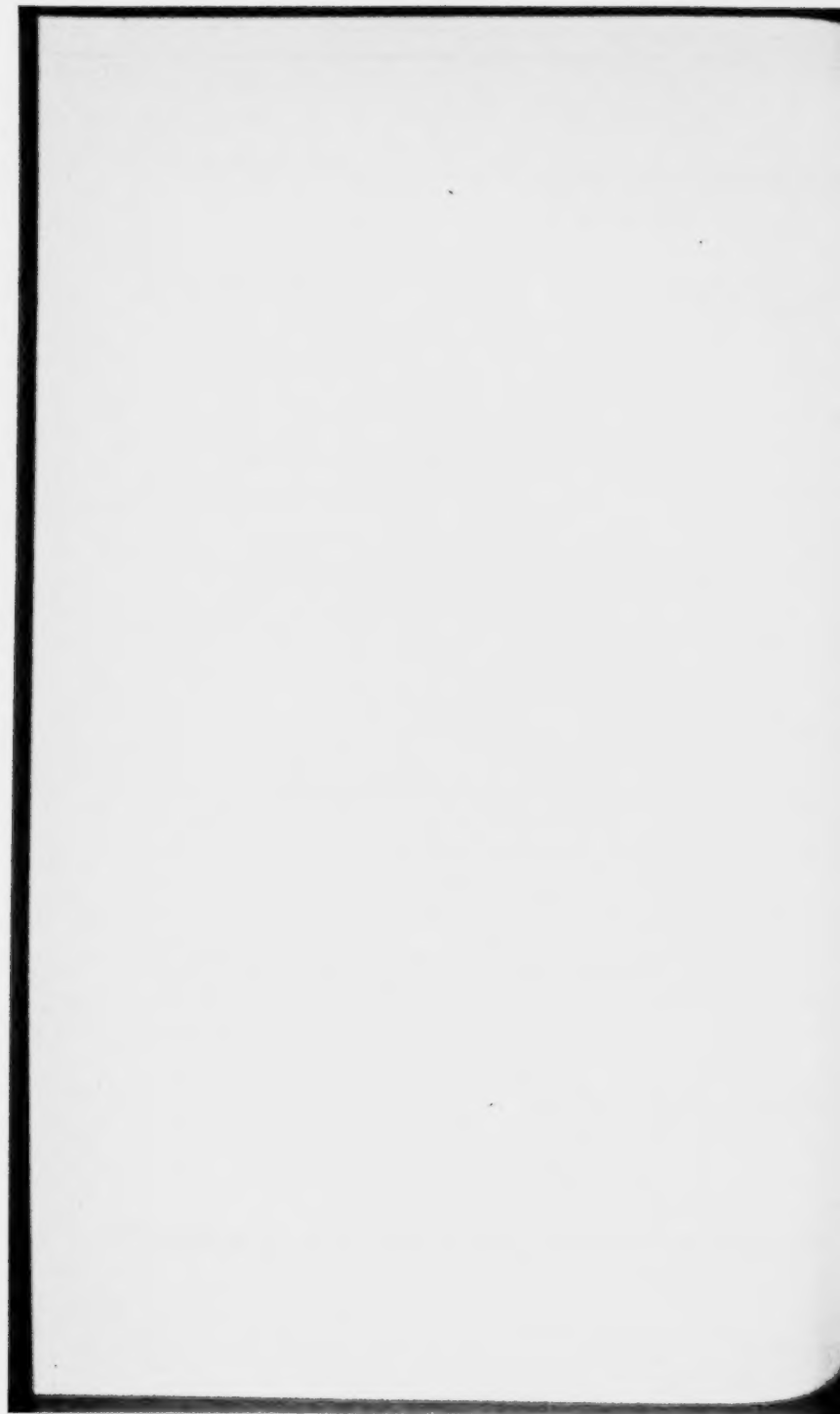
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## BRIEF FOR PETITIONER.

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# Supreme Court of the United States

OCTOBER TERM, 1919.

No. 171.

REDERIAKTIEBOLAGET ATLANTEN,  
Petitioner  
(Respondent below),

vs.

AKTIESELSKABET KORN-OG FODER-  
STOF KOMPAGNIET,  
Libelant.

**BRIEF FOR REDERIAKTIEBOLAGET ATLANTEN, PETITIONER (RESPONDENT BELOW).**

## **Statement.**

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed a final decree of the United States District Court for the Southern District of New York for \$39,016.30 in favor of the libelant, charterer of the steamship *Atlanten*, for damages for the breach of the charter-party to the extent of the difference between the charter-

party rate and the market rate at the time that the vessel failed to perform her charter.

The opinion of the District Court is printed in the Transcript of Record, p. 17; the two opinions of the Circuit Court of Appeals, pp. 25 and 29, and the final decree, p. 21.

The answer of the steamship owner admitted the making of the charter and that the *Atlanten* had failed to make the voyage. It set up two defenses, (1) in articles 9 to 15 of the answer (pp. 15, 16) that the libelant was a Danish corporation, the respondent a Swedish corporation; that the charter-party was signed in Denmark; that the charter-party provided for arbitration, and that both by the laws of Sweden and Denmark the arbitration clause was binding and was a condition precedent to the right of either party to sue the other; (2) in article 8 (p. 14) a partial defense that the charter-party limited the recovery for failing to make the voyage to the proved damages, with the limitation that they were not to exceed the estimated amount of charter freight. The libelant excepted to the answer and thus distinctly raised the question of the validity of these defenses. Judgment was given in favor of the libelant for the entire damages claimed, as above stated.

## FIRST POINT.

**The Court should have refused jurisdiction on the ground that the case should have been arbitrated before resort was had to the decision of the Court.**

### 1. THE FACTS.

The 21st clause of the charter-party reads as follows:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. \* \* \*"

The above clause then states that the award of the arbitrator shall not be revoked without leave of Court.

*The Defense*—How Pleaded. The eleventh article of the answer alleges:

"At the time of the making, execution and delivery of the said charter-party it was, and at all times since then has been, the law of the Kingdom of Denmark, applicable to said charter-party, that a provision in a charter-party that any dispute arising thereunder should be settled by arbitration, each party nominating their arbitrator and the latter agreeing upon an umpire, if necessary, is a valid and binding agreement for arbitration, and is binding upon each party to the said charter-party, and arbitration accordingly of any dispute arising thereunder is a condition precedent to the right of either party to sue the other in any court for, upon or by reason of any matter or dispute with respect to or arising under said charter."

The twelfth article of the answer alleged that the law of Sweden was the same as the law of Denmark, and the thirteenth article alleged that the respondent had been ready and willing at all times to arbitrate, but that the libelant had failed and neglected to do so. The fourteenth clause of the answer states that under the law of Denmark and Sweden libelant had no right to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein, but was pledged to submit the same to arbitration, in accordance with the terms of the charter-party, and the fifteenth article of the libel demanded that since the dispute was a dispute between foreigners in connection with a contract made in Denmark, the Court should not entertain jurisdiction.

## 2. ARBITRATION AGREEMENTS SHOULD BE VALID.

*Decisions refusing to enforce arbitration agreements unsound.* There is no reason why agreements to arbitrate, solemnly entered into by parties of lawful age, should not be enforced, except the historical reason from which Lord Campbell said the rule arose, quoted by Judge Hough in *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed., 1006, at 1007:

"in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

Judge Hough appropriately says, "A more unworthy genesis cannot be imagined" (222 Fed., 1007).

*Arbitration increasing.* At the present time the tendency toward arbitration is becoming more and more marked. It is being introduced to settle international questions and labor disputes, as well as commercial disputes. The principle has been recognized by the Appellate Division of the Supreme Court of New York in both the First and Second Departments, which have recently approved the rules for arbitration made by the Municipal Court. Many of our states have statutes allowing arbitration. Our stock, produce and other exchanges have permanent arbitration boards.

*Book of the New York Chamber of Commerce.* The Chamber of Commerce is interested in forwarding the movement, and the counsel of its Committee on Arbitration, which has charge of this matter, in 1918 published a treatise reviewing the whole subject: "*Commercial Arbitration and the Law*," by Julius Henry Cohen.

In an address before the Chamber of Commerce of the State of New York on June 1, 1911, Judge Vernon M. Davis, of the Supreme Court of the State of New York, said:

"I also congratulate this Chamber of Commerce upon bringing again into existence a simple and effective plan for settling business disagreements without resort to the courts. In this, as in many other things, the Chamber has maintained its character of being alive to all public needs, and has performed an important public service. Why should business men undertake long and expensive litigation over ordinary differences arising between them? I think it must be a habit, and a bad habit too. I am hopeful to predict, and I appeal to your experience to justify that prediction, that a very large number of the disputes that are now carried

to the courts will be settled speedily and inexpensively under the scheme of arbitration which has just been adopted by this Chamber. \* \* \*

The plan adopted by the Chamber is in no sense in competition with the courts, nor can it be justly regarded as a protest against any real or fancied delay in the administration of justice in this city. It has arisen out of an obvious condition of business life here, the obvious fact that it is practicable to avoid the delay and expense of a suit in court by a resort to arbitration, and the courts look upon these settlements with great favor, and it is the policy of the law to encourage arbitration, so much so that by special statute the awards of arbitration may become the judgment of the Supreme Court, judgments of as high a sanction as those obtained in the formal litigation in the courts" (*Cohen on Commercial Arbitration*, 260).

*If it were necessary to reverse decisions refusing to enforce arbitration, they should be reversed.* Cases of the absolute unqualified reversal of previous decisions are frequent. For example, the legal tender cases:

*Knox v. Lee*, 12 Wall., 457, reversing  
*Hepburn v. Griswold*, 8 Wall., 603.

The income tax cases:

*Pollock v. Farmers' Loan & Trust Co.*, 157  
U. S., 429, reversing  
*Springer v. The United States*, 102 U. S.,  
586, and  
*Pacific Insurance Co. v. Soule*, 7 Wall.,  
433.

In *The Genesee Chief v. Fitzhugh*, 12 Howard, 443, the United States Supreme Court held that the admiralty jurisdiction of the United States Courts extended to navigable lakes and rivers connecting

them, and was not limited to tide waters, reversing completely the Court's decision in *The Steamboat Thomas Jefferson*, 10 Wheaton, 428 (1825).

Chief Justice Taney in the course of his opinion writes:

"It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an *erroneous decision* into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825 when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day."

Mr. Justice Lurton has said:

"The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is *not inflexible*. Whether it shall be followed or departed from is a question entirely within the *discretion* of the Court which is again called upon to consider a question once decided." (Italics ours.)

*Hertz v. Woodman*, 218 U. S., 205, p. 212.

Our learned jurists have reached the same conclusion. Chancellor Kent says in his Commentaries, 14th Ed., Vol. 1, p. 477:

"But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recol-

lect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. \* \* \* Lord Mansfield frequently observed that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science, were it founded upon precedents only."

Mr. Justice Holmes has said:

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

*Oliver Wendell Holmes, Jr., The Common Law, p. 35.*

And also:

"The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."

*The Common Law*, p. 41.

*Reason for the rule having ceased, the rule should cease.* The first reason given for the origin of the rule by Judge Hough that the Courts wanted to try as many cases as possible, when paid by a fee system, no longer prevails, the modern effort being to give the Courts more time to consider their cases by relieving their overcrowded calendars. The rule of public policy certainly does not hold to-day, and this is clearly a case for the application of the well-established legal maxim: "*Cessante ratione legis cessat, et ipsa lex.*"

*Coke Litt.*, 70-b.

2 *Blackstone Comm.*, 390-391.

### 3. THE COURT SHOULD ENFORCE FOREIGN LAW AS TO THESE FOREIGNERS.

*Not necessary to overrule arbitration decisions.* There is no occasion, however, to overrule arbitration decisions in this case. This is not a question whether a United States Court will enforce an arbitration agreement in which a citizen of the United States is one of the parties, on the ground that such contracts are not binding under our law, but it is a case where the question before the Court is whether, when a contract is made in Denmark, between Danish and Swedish corporations, the arbi-

tration agreement being absolutely valid by the law of the country where the contract is made and the parties reside, this Court will consider it in the interest of justice to let one of these parties come over to the United States and sue in our Courts for the purpose of avoiding his just legal obligations.

*The case governed by the law of Denmark.* Foreign law may be pleaded and proved. It has been pleaded, and it is admitted in this case that under that law the arbitration is binding. There can be no question that this Court should enforce that law. There can also be no question that this Court has the power to refuse jurisdiction. In *Goldman v. Furness, Withy & Co.*, 101 Fed., 467, Judge Brown of the Southern District of New York refused to take jurisdiction in a suit between foreigners on the ground that the ends of justice would not be promoted thereby. Mr. Justice Holmes said, in the case of *Cuba R. R. Co. v. Crosby*, 222 U. S., 473, at p. 479:

"The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

#### 4. THE LEADING AUTHORITIES.

*Two important cases in the Southern District of New York.* Two cases were conspicuously referred to in the court below, though they were not as strong as the case at bar, since in each case the libellant was a citizen of the United States, while in the case at bar both parties were foreigners.

*United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, decided by Judge Hough, 222 Fed., 1006, already referred to.

*Frank C. Clark v. Hamburg-American Packet Co.* (unreported). This case, decided by Judge Ward, is printed as an appendix to this brief (p. 37). See also *Fix v. R. R.* 3 Wall 81 243

These cases have now been superseded by the decision of the Circuit Court of Appeals in the case at bar, but are cited because they are believed to be the two cases most in point on the question whether a foreigner can avoid his valid contract to arbitrate by suing in our courts.

The opinion of Judge Hough in the *Asphalt Company* case gives a valuable review of the authorities. He thus states the point in issue:

"Libelant asserts that, whether the contract was or was not good at the time and place of making, it has always been invalid under the law of the United States and most of the states thereof, with the admitted and asserted result that an American may make a solemn contract of this nature in England and repudiate it at will in America with the approbation of the courts of his own country."

Judge Hough cites the various reasons given for refusing to enforce arbitration agreements, and indicates that he does not find them satisfactory. He concludes that, on the facts in the *Asphalt Company* case, he is bound by authority.

"I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the

power of that tribunal to make this rule. Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed, and these motions be severally denied" (222 Fed., p. 1012).

In the Circuit Court of Appeals, in the case at bar, Judge Hough said of the general rule that arbitration agreements will not be enforced (Record, p. 29):

"Whether the rule as given can long survive historical and logical criticism I venture to doubt."

*Frank C. Clark v. Hamburg-American Packet Co.* (printed in the appendix) is a decision squarely in favor of petitioner, recognizing an arbitration agreement made between foreigners.

*The Law of Massachusetts.* In a similar case, the Supreme Court of Massachusetts has held that, where foreigners provide in their contract that questions under the contract shall be decided by their own courts, the provision will be held binding by an American court.

*Mittenthal v. Mascagni*, 183 Mass., 19.

*Daley v. People's Building etc. Assn.*, 178 Mass., 13.

In 1902 the plaintiff Mittenthal made an agreement with the composer Mascagni for the latter to make a fifteen weeks' concert tour in the United States and Canada. This agreement was made in Florence, Italy, "where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of the City of New York, elected a domicile by a provision of the contract" (183 Mass., at 21). There was a provision in the contract as follows:

"The present contract in its form and substance is regulated by the Italian laws, by the will of the parties concerned, and according to Article 9 of the Italian Civil Code. Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy. Maestro Mascagni reserves the right of direct action in New York for payment of his recompense, and therefore he, alone, has the faculty to derogate the conditions of the established contract."

Mittenthal attempted to sue Mascagni in the Massachusetts Court for an alleged breach of the agreement, and it was held by the Massachusetts Supreme Court, Knowlton, C. J., writing the opinion, that the action could not be maintained. He said:

"We have little doubt that it was meant to give exclusive jurisdiction of all such matters to the Italian Courts, saving only jurisdiction of suits by the defendant to recover his compensation, which is given to the Courts of New York. This seems to be the meaning of the words of this translation \* \* \* *It is averred in the answer in abatement that such a provision is legal and binding under the laws of Italy; of course, if this be true, it is immaterial what construction is put upon it under our laws*" (p. 22).

"We can fancy the parties to this contract at the time of making it saying something like this: 'As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances through a great many independent States, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the State, may be arrested and held to bail or to imprisonment, if suits may be brought in any one of these numerous jurisdictions, there

is a liability to great trouble and expense on the part of the defendant in meeting the litigation. \* \* \* It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either.' If, moved by such considerations, the parties made the agreement in question, shall the court say that they were *non compotes mentis*, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?" (pp. 23-24).

Mr. Justice Holmes reached the same conclusion in the *Daley* case.

##### 5. GROUNDS ON WHICH THE COURT BELOW REFUSED TO RECOGNIZE THE ARBITRATION CLAUSE.

*Judge Hough's opinion in the case at bar.* As stated above, Judge Hough doubted if the rule refusing the enforcement of arbitration agreements could long survive, and placed his decision on the following ground (p. 29):

"Concurrence as to clause 21, I rest on the plain fact that respondents repudiated their agreement *in toto*, and thereby debarred themselves from insisting upon any single subordinate part thereof (*Jureidini v. National etc. Co.* [1915], A. C., 499)."

The *Jureidini* case was an action on an insurance policy which provided that if the *amount* of the loss was disputed, the *amount due* should be fixed by arbitrators, and the fixing of this amount should be a condition precedent to bringing suit.

The insurance company refused to pay the loss on the ground that the insured had been guilty of arson.

When the insurance company was sued it pleaded arson as a defense and also that no arbitration had been had.

Held, that the real issue in the case was arson, which went to the general merits of the case, not to damages, and that since the liability under the contract, not the amount of damages, was the question to be solved, arbitration had nothing to do with its determination. The arbitrators were not to settle every matter in dispute but, like commissioners in an admiralty court, were to deal with damages only.

In the course of the *Jureidini* opinion it was stated that *respondents* had repudiated their agreement *in toto* and therefore could not rely on the arbitration clause, appropriate language in connection with the facts, but, we submit, not applicable to the case at bar.

The petitioner does not repudiate the agreement but has always admitted every word of it, and relies upon clauses in it. The petitioner has always admitted its obligation to pay under the contract, but claims that this obligation is limited to the estimated amount of freight. This is recognized in the opinion of Judge Ward in the case at bar when he says (Record, p. 28):

"The respondent does not seek to repudiate the charter."

*The Jureidini case interpreted in a later decision.* That the above analysis is correct appears from a case decided by the English Court of Appeal in 1919.

*Woodall v. Pearl Assurance Co., Ltd.*, 24  
Comm. Cases, 237. 1919

1 K. B. 59

That was also an action on an insurance policy, containing an arbitration clause which read as follows (p. 237) :

"If any question shall arise touching this policy or the liability of the company thereunder \* \* \* the assured and all persons claiming through the assured \* \* \* shall be bound if the company so require to refer the same to arbitration \* \* \* and no person shall be entitled to bring or maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

It will thus be noted that the arbitration clause, like the arbitration clause in the case at bar, related to all matters in dispute, not, like the arbitration clause in the *Jureidini* case, to the amount of damages only.

The insurance company refused to pay for the loss of life under the policy, on the ground that the insured had misstated material facts. Thus, the case is stronger than the case at bar, for if the assured there misstated material facts, the policy would become void.

In the case at bar the petitioner admits the validity of the charter and merely raises the point that under that charter it has the right to refuse the performance on paying the estimated amount of freight.

The Court held in the *Woodall* case that the insurance company admitted the existence of the insurance policy and was entitled to have the matters in dispute arbitrated, as a condition precedent to bringing suit.

Banks, L. J., said (p. 243) :

"In *Jureidini's* case, it is material to note what the policy provided in reference to arbitration and

in reference to any misdescription rendering the policy void. Clause 12 referred to a number of matters, one of which was a case of a false declaration having been made and used in support of the claim, and it provided that, in the event of the happening of any of these matters, all benefits under the policy should be forfeited. The arbitration clause was one which provided for arbitration as to the amount of any loss or damage, and was confined to the ascertaining of the amount of loss or damage if the dispute between the parties was as to loss or damage only. What happened there was, that the insurance company claimed that the policy had been forfeited. There was no dispute as to liability; they claimed boldly that the policy had been forfeited and that there was consequently no existing binding contract between the parties. Those being the circumstances, the matter proceeded, and the insurance company set up that the plaintiff had no right of action. That was the question which had to be decided, and which was ultimately decided in the House of Lords. The opinions of the Law Lords do not, I think, proceed upon quite the same grounds, but in every case the fact is made perfectly plain that the decision proceeds upon the ground that the dispute between the parties was not a matter which came within the arbitration clause at all, but that the position of the insurance company had been the position of a person who was repudiating his contract in the fullest sense and asserting that the policy had been forfeited. I do not think I need refer to the passages which have been so often read, either from the opinion of Lord Haldane or from that of Lord Dunedin or Lord Atkinson. I will just refer to *Stebbing's* case as being a good example of the second class of case to which I have referred, and I will refer to the language which was used by Viscount Reading, C. J., as making that point clear. At p. 436 of the report in (1917) 2 K. B., Viscount Reading, C. J., says this: 'But the phrase "avoiding the policy" is loosely used in reference

to the circumstances of this case. In truth the company is relying upon a term of the policy which prevents the claimant recovering'; and page 437 he says: 'In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy.' Now, here, as I have said, the real dispute between these parties was, whether the deceased man did originally correctly describe himself, because, if he did not, by the terms both of the proposal and of the policy itself, the policy would be voided; and, secondly, whether, assuming he correctly described himself, he had afterwards changed his occupation, in which case, by clause 8 of the policy, the policy would be void and no claim could be made. And, that being the dispute between the parties, there is an arbitration clause which provides that, 'if any question shall arise touching this policy or the liability of the company thereunder'—which those two questions which I have just mentioned are—then, if the company shall so require, the assured shall be bound to go to arbitration, and he (because he is included under 'no person') shall not be entitled 'to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration.' In my opinion, therefore, the company were right in their contention that in this particular case, having regard to the attitude which they took up and to the terms of the policy and the arbitration clause, they were entitled to say that this was a case which fell within the principle of *Scott v. Avery*, and that the plaintiff had no right of action unless and until the amount due to her was ascertained by arbitration."

Warrington, L. J., said (p. 248):

"But in my opinion *Jureidini's* case was quite a different case; in the first place, there was total

repudiation in *Jurcidini's* case; in the second place, the arbitration clause in *Jurcidini's* case did not extend to questions affecting liability under the policy; it only extended to differences as to the amount payable under it. The consequence is that, if the contention of the insurance company in that case had prevailed, there would have been no means at all of deciding the question as to the liability or non-liability of the insurance company by reason of the facts which they alleged. According to them, it could not have been decided by the Courts, and by the terms of the arbitration clause it could not have been decided by arbitration. That difficulty was pointed out by Lord Atkinson, and also by Lord Parmoor, and I think the same difficulty occurred to Lord Dunedin, as appears from the passages from his judgment which have been read to us."

We submit, therefore, that the *Woodall* case, decided since Judge Hough rendered his opinion, shows that the *Jurcidini* case does not prevent the petitioner from insisting on arbitration as a condition precedent.

*Judge Ward's opinion in the case at bar.* The arbitration clause in the case at bar is dealt with in Judge Ward's opinion in the Circuit Court of Appeals, which opinion is the opinion of the majority of the Court, on page 26 of the record, as follows:

"This clause cannot be regarded as a condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall 'settle,' that is, dispose of the dispute."

We submit that the *Woodall* case, above referred to, shows that this statement is inaccurate. There arbitration under a general arbitration clause was

held to be just as much a condition precedent to suit as an arbitration clause relating to damages would be. It is stated in the answer and admitted by exception that, under the law of Sweden and Denmark, arbitration under this arbitration clause is a condition precedent to bringing suit in any court. If this statement had not been admitted by exception, we could have proved that, under the law of these countries, the matter would have to be arbitrated in accordance with the agreement of the parties and that the court would only interfere in the situation in case the party sued had refused to perform the arbitration award when made, or otherwise had violated his arbitration obligations.

Judge Ward proceeds to state (Record, p. 26) that the petitioner is not justified in insisting that the charterer cannot go into court, without submitting the case to arbitration, on the authority of *Hamilton v. Home Ins. Co.*, 136 U. S., 242. This is evidently the main point which the Court was leading up to in the passage quoted.

The *Hamilton* case held that where the insurance policy contains a clause that the damages must be arbitrated before suit can be brought upon the policy, the provision is valid. It may also be inferred from that case that the Court would have held that, if two Americans had provided in an insurance policy, as was done in the *Woodall* case, that all questions under the policy should be arbitrated as a condition precedent to suit, it would have held such a clause void as against public policy.

We very respectfully submit that it is illogical and not according to a broad commercial policy to say that arbitration agreements if they relate to damages are valid, but not if they relate to gen-

eral liability under the contract. We further maintain that even if this were not so, there is no reason why a United States Court, as a matter of public policy, should instruct the citizens of Denmark or Sweden what their law ought to be on this arbitration question or, what amounts to the same thing, allow action to be brought in the United States Courts, bring the matters in dispute to a valid judgment, and thus absolutely nullify the agreement to arbitrate which the laws of Denmark and Sweden hold to be a binding agreement.

There is no such public policy.

The important point to note here is that this agreement to arbitrate, in this particular case, is admitted by the pleadings to be a condition precedent to the bringing of suit. If this Court, in spite of this, allows the suit to be brought, it is not because arbitration is not a condition precedent, but because this Court on the ground of public policy or for some other reason holds that it ought to allow a citizen of Denmark to wholly disregard this provision of the law of his country which would prevent him from bringing suit before arbitration.

6. PUBLIC POLICY DOES NOT REQUIRE THE NULLIFICATION OF VALID AGREEMENTS TO ARBITRATE MADE IN FOREIGN COUNTRIES.

*The leading English authority.* That public policy in Scotland does not require the courts to nullify arbitration agreements, if valid by the laws of the country where made, is well settled.

*Hamlyn v. Talisker Distillery, L. R. (1894), A. C., 202.*

Under the laws of both England and Scotland, contracts to arbitrate were for a time considered void as against public policy. At the present time, the contrary rule has been established in England, through court procedure, the courts having authority in their discretion to stay proceedings in court, where contracts contain an arbitration clause. In Scotland, however, the old idea of public policy remains the law.

In the *Hamlyn* case, decided on appeal from a Scotch Court by the House of Lords, a contract signed in London between an English and a Scotch firm provided for arbitration, the clause being invalid by Scotch law. When suit was brought in Scotland the defense was raised that the case had to be arbitrated, and the Court held that the case was governed by English law; that it would enforce the English law, and that the arbitration agreement was a matter of right. It drew this clear distinction that the right to have an arbitration *is a matter of right*. The Court admits that, when a Court does take jurisdiction, then its procedure is a matter of remedy and that it will follow its own rules and not be governed by those of a foreign country. Otherwise the Court would be unduly hampered. But it points out that the question whether the Court should or should not take jurisdiction is not a question of its forms of procedure but *is a matter of right* about which the parties contract.

On page 210 Lord Herschell said:

"But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that

consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the Courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where the merits fall to be determined in the Scotch Courts, insist, by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is whether it is a case in which the Courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail."

In short, the Court decided that the Scotch Courts must not enforce their own public policy in regard to arbitration, but must apply the law of the country governing the contract.

*The arbitration clause in the case at bar similarly a matter of right.* In the case before us the question was similarly not one of the Court's procedure, after taking jurisdiction, but a question whether the Court would take jurisdiction; a question of the right of the parties to insist upon arbitration as provided by the contract.

*Matters of remedy and of right.* It would not be in accordance with the principles of sound jurisprudence to allow the rules of procedure of a foreign country to be imposed upon United States Courts in the conduct of cases of which they take jurisdiction, even if such foreign procedure is proved or admitted. This sound principle has given rise to the common phrase that if a matter relates to remedy, "not right," foreign law will not be enforced. The phrase must always be construed in the light of the principle of law on which it is based. It applies only to cases where the Court takes jurisdiction and the procedure thereafter adopted. The right to arbitrate is not a matter of procedure or "remedy" within this principle of law. It is a right given by the law of a foreign nation. Our Courts cannot in any way be hampered in the administration of justice by rules of foreign procedure, by recognizing this right. In doing so they recognize the valid law of a foreign country, and take no jurisdiction whatsoever.

The above distinction is made clear in the case of *Hamlyn v. Talisker Distillery* (*supra*).

7. THE CONTENTION THAT THE NON-PERFORMANCE CLAUSE AND ARBITRATION CLAUSE DO NOT RELATE TO A CASE OF NON-PERFORMANCE BUT ONLY TO A CASE OF DEFECTIVE PERFORMANCE.

Judge Ward in his opinion in the Court below said (p. 28):

"The respondent does not seek to repudiate the charter, but contends that it authorizes a withdrawal at any time. To us, however, both clauses 21 and 24 seem to contemplate disputed breaches

by either party during the performance of the charter-party and not a refusal of either party to perform at all."

This quotation shows that the petitioner did not make clear its position to the Court. The petitioner did not contend that the non-performance clause related to a case of partial performance. The clause, "penalty for non-performance of this agreement," seems specially to relate to a case where the charter is not at all performed. Possibly the clause might also refer to a case of partial performance, but that is not necessary to pass on here, as it was a case of non-performance.

The arbitration clause also seems broad enough to cover the situation. It reads: "If any dispute arises the same to be settled, etc."

We submit, therefore, that Judge Ward was in error in holding that the two clauses when construed together showed that only partial breaches were to be arbitrated.

#### 8. ARBITRATION WOULD HAVE WORKED OUT IN A PRACTICAL MANNER IN THE CASE AT BAR.

The courts will always be one of the greatest, if not the greatest, force for the maintenance of order in a community. They must necessarily be the final arbiter in disputes between parties which are not settled otherwise. If parties will not abide by an arbitration award, the courts must enforce it, if the arbitration is binding. The procedure of the courts, however, is formal and takes time. The case at bar arose in 1914. Although the delay in settlement is in large measure due to the fault of the parties, much delay in the courts is inevi-

table. It is believed that the courts generally look with favor on settling such disputes as can be settled by business arbitration. In the case at bar, the captain at the port of loading would have appointed one arbitrator and the charterer another. The arbitration clause provided that in case of a disagreement they should appoint an umpire. The owner clearly felt that his liability for non-performance was limited to freight, but he recognized that the charterer disagreed with him. The owner was ready to do anything reasonable, and would have allowed his vessel to proceed at the market rate if an arbitration had been decided in his favor. This appears from the correspondence annexed to the libel. It is advantageous to settle disputes in this way rather than to have the vessel actually withdrawn and large damages incurred, as the only method of settling the dispute between the parties. Here the charterer began suit the moment the vessel arrived, without arbitrating.

## **SECOND POINT.**

### **Limitation of liability to estimated amount of freight.**

We submit that this Court will hold that this case should have been arbitrated and will refuse to consider the merits of the controversy. In case of a contrary decision, the points to be considered are as follows:

*The issue.* In the charter-party there is a provision that the penalty for non-performance of the agreement is proved damages not exceeding the estimated amount of freight. An unusual condi-

tion of the freight market so altered rates that at the time of performance the damages were greater than the freight. The shipowner failed to carry out his contract, and the question arose as to the validity of the limitation.

*Nothing immoral or unfair in having the parties limit the damages to a given amount.* When parties limit their damages, in case of a breach of contract, to an amount agreed upon, there should be no complaint when the breach occurs. There may be large fluctuations at any time in charter rates and in the risk to be run by a vessel in making a given voyage. This is peculiarly the case in time of war, and the owner of a vessel may reasonably wish to insert a clause to limit his obligations in case of any contingency which materially affects his obligations. The restraint of princes clause is a clause of this character; so are war clauses. The parties might have inserted a clause which would have justified the owner in refusing to perform, without making any payment whatever, in case of submarine blockade, which blockade began after signing and before performance. Instead they inserted a clause which justified refusal to perform on paying the estimated amount of freight.

*The limitation clause in the case at bar.* The clause here was as follows:

"24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

*The right to limit clear.* There is no reason in law why the parties, if they chose, should not enter into an agreement that the penalty for non-per-

formance of the agreement should be the proven damages not exceeding the estimated amount of freight. The only question is whether they have used appropriate language to express that idea. The majority of the Circuit Court of Appeals said in its opinion (p. 28) :

"No doubt the parties could agree that either might deliberately and for his own interest withdraw entirely from the charter and be responsible for no more than the estimated amount of freight."

The District Judge said (p. 21) :

"Of course the parties might have agreed to limit him, but there is no apparent reason for supposing that such a formal and mechanical equality was within their contemplation."

To the same effect see *Watts v. Mitsui & Co., Ltd.* (1917), 22 Commercial Cases, 242, a case followed here by the Court below, where the House of Lords by dictum (Lord Dunedin, pp. 252, 253) declared a similar limitation clause invalid. Lord Finlay said (p. 246) :

"I agree with the construction put in the Courts below on Clause 13—the penalty clause. If this clause had appeared for the first time, I think it might have been construed as imposing a limitation on the damages to be recovered, \* \* \*."

*The meaning of the old penalty clause.* The old penalty clause read, "penalty for non-performance of this agreement estimated amount of freight." Its meaning was clear, that if a man voluntarily or negligently broke the charter, he must pay the sum fixed as a penalty. The actual damages might be greater or less. In so far as it served as a limitation, the clause would have been valid; but

because it served also as a penalty, requiring more than actual damages to be paid, the same amount whether the breach was partial and slight or total and severe, the clause in that form has always been held invalid.

*Watts v. Camors*, 115 U. S., 353.

*How to modify the old penalty clause to make it valid.* Charter-parties and bills of lading have almost invariably grown by modifications of existing forms. Negligence and other exemption clauses have been criticized by the courts and their form modified to meet such criticisms. In a note to *The Glenfruin*, in *Scrutton on Charter-Parties*, 8th Ed., p. 90, Judge Scrutton, referring to two exceptions in a bill of lading, says: "These two exceptions bear the mark of *The Glenfruin* (1885), 10 P. D., 103." Any shipping man wishing to retain the valid limitation feature of the old penalty clause would naturally do so by eliminating the objectionable feature, the possibility of an award greater than the actual damages. The clause would then read: "Penalty for non-performance proved damages, not exceeding the estimated amount of freight." That is the clause in the case at bar. With the clause thus modified, the objectionable feature criticized by the courts is eliminated.

*The word "penalty" calls attention to the fact that the breach may be voluntary.* One point more. The word "penalty" renders a distinct service in this clause. The libellant's proctor has expressed surprise at the wilful manner in which the owner deliberately broke the contract. The word "penalty" should have prevented such surprise. It is

the word which we use when we ask what we will suffer if we commit a breach of obligation voluntarily. We ask what will be the "penalty" for failing to hold an annual meeting of a corporation or file a tax return. We wish to know what will be the consequences if we *voluntarily* and *deliberately* fail to do the act.

Even without the word "penalty" it is well settled that it makes no difference whether the breach is voluntary or not.

*Winch v. The Mutual Benefit Ice Co.*, 9 Daly (N. Y.), 177, particularly at pp. 181, 182. Affirmed in all respects, but with the addition of interest, 86 N. Y., 618.

*Alpha Portland Cement Co. v. Davis*, 134 Fed., 274, particularly at p. 280. Affirmed 142 Fed., 74 (C. C. A., 3rd Circuit.)

The courts do not construe a clause as a penalty clause because it contains the word "penalty." It is only a penalty clause if it provides for more than the actual proved damages.

*U. S. v. Bethlehem Steel Co.*, 205 U. S., 105.

On the general subject, see also:

*Sun Printing & Publishing Assn. v. Moore*, 183 U. S., 642.

*Wise v. United States*, 249 U. S., 361.

*The limitation clause made the risk run by both parties, in case of a voluntary breach, the same. During the war changed conditions, after the con-*

tract was made, often make it grossly unfair that the parties should perform a charter for the amount stipulated. From the nature of the case, the limit of the charterer's liability to the owner, if he voluntarily refused to perform, was the estimated amount of freight. That was all that the owner could get out of the charter in any case. But changed conditions in hostilities frequently made the charters of vessels, which ran the risk of being sunk, many times greater than the amount originally stipulated in the contract. Unless a shipowner had absolutely bound himself by contract, it was very unfair that he should perform the voyage for a sum which would not compensate him for the risks he ran. A prudent owner might properly want to know what penalty he would have to pay if under changed conditions he refused to perform the contract at a terrific loss. He might properly insert a limitation clause by which he would have to pay the same amount for a breach that the charterer would have to pay if he made a voluntary breach, that is to say, proved damages not exceeding the estimated amount of freight.

*The amount of the limitation clause a reasonable one.* In the court below, the proctor for libellant objected to the limitation clause because of its amount, apparently because it was not the same amount as the actual damages. But the whole purpose of the limitation is to fix an amount beyond which the damages shall not go. The amount chosen was thought by both parties to be the monetary value of the contract when they made it, which gives a ground for choosing the amount, and it also puts the parties on an equality, as above stated.

*Theory of the Court below that the old penalty clause was modified with the intention of making no modification in it.* The Circuit Court of Appeals cited *Wall v. Rederiaktiebolaget Luggode* (1915), 3 K. B., 66, and the dictum approving it in *Watts v. Mitsui & Co.* (*supra*) as its authority for holding the limitation clause invalid, and incorporated part of Judge Swinfen Eady's opinion in the *Watts* case in its own opinion (Record, p. 27). Judge Swinfen Eady states that Judge Bailhache in the *Wall* case thought the modification of the old penalty clause did not modify it in any way, but he himself claimed that there was a theoretical distinction. Suit in England, he said, could be brought on the penalty clause or for general damages. If libellant sued under the old penalty clause or under the modified clause, he could collect only his actual damages, not to exceed the penalty; if he sued for general damages, he would recover the full damages. So far they were alike. But Judge Swinfen Eady makes this distinction, that in English practice, under the old penalty clause, the judgment would be for the amount of the penalty but execution would be limited to the actual damages proved, while under the modified clause the judgment would be for the actual damages proved, not exceeding the penalty. In England no one sues on the penalty clause, as Judge Bailhache expressly stated in the *Wall* case, p. 73, so that even this fine distinction does not exist for practical purposes, and in America no one can sue on the penalty clause, if it be a penalty clause, for penalty clauses are held invalid. Even in England, Bailhache, J., referred to the substitution of this modified clause as an "idle task" (Report of Case, 1915, 3 K. B., at p. 74). Is it not difficult to

suppose that commercial men in England, America or Denmark, where the contract was made, would take these legal technicalities, which they did not know of, into account? Would they not think that the clause means just what it says, that in case one of the parties refused to perform the contract, the other could recover proved damages, not to exceed the freight?

*Every sentence in the instrument should be given effect.* Judge Bailhache's decision violates the principles of law which prevail in this country relating to the construction of instruments. He plainly states that he infers that the parties were engaged in the idle task of modifying a well-known dead letter clause so that it might still remain a dead letter. It is submitted that, in spite of the continuous modification of charter-parties and bills of lading that has always taken place, not a single instance of such an "idle task" could be cited. The following well-known authorities show that to assume that the parties could do such an act is in direct conflict with well-established rules of construction:

"All parts of the writing and every word in it, will if possible be given effect" (9 *Cyc.*, 580).

"Every clause and even every word shall be given effect if this is in any way possible" (17 *Am. & Eng. Encyc. of Law*, 2nd Ed., p. 7).

"It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (Lord Chancellor Cairns in *Bowes v. Shand*, 2 App. Cas., at p. 463, quoted by the Supreme Court in *Norrington v. Wright*, 115 U. S., 188).

"The four corners of the instrument must be examined to ascertain the meaning of any of its stipulations, and each of them must be construed so as to give effect to all, if possible" (*Cleveland Iron Co. v. East Itasca Min. Co.*, 146 Fed., 232, 235; C. C. A., 8th Circuit).

*Special attention should be given to new matter.* This doctrine is clearly set forth by Judge Putnam, sitting in the Circuit Court of Appeals in the First Circuit, in the case of *W. K. Niver Coal Co. v. Cheronca S. S. Co.*, 142 Fed., 402, at 404:

"Charters, like nearly all maritime documents, can be properly construed only when construed historically. The common practice when changes have been desired in charters, marine insurance policies, and other maritime documents, has been to insert into the old body a new clause supposed to have reference to the particular emergency which it concerned. Thus it follows that inconsistent expressions are found in such documents; and so it is in the present case. *Scrutton's Charter-Parties and Bills of Lading* (5th Ed., 1904), at page 22, pertinently says: 'It is unnecessary to find a meaning in the particular charter for every word of a common printed form.' When a maritime document is studied historically, the necessity of complete reconciliation at times disappears, and what is introduced as new matter masters the rest of the document, on the same principle that written words master the rest of a printed blank deed, or contract, into which they have been inserted."

*The new matter, inserted in the penalty clause, must control.*

*If there is any doubt in the construction of the charter, it should be construed against the charterer.* The charter is a Danish charter; the head-

ing is that of Hecksher & Son, the charterer's brokers (see Schedule A, inserted at p. 4 of the record). The steamship owner was a resident of Sweden and the letters which have been introduced in evidence on behalf of the charterer show that when performance was refused, notice was given to the charterer's agents, Hecksher & Son, at Copenhagen, Denmark, where the charterer resided (Schedule B, pp. 8 and 9).

*Conclusion. The meaning of the clause is clear.* We cannot keep too clearly in mind that there is but one point in this branch of the case. What is the meaning of this clause? It is perhaps more a matter of common sense than law. Does this language mean that the parties are to recover their proved damages, not exceeding the estimated amount of freight? If it does, that is a perfectly legal agreement to make.

We also call attention to the fact that, in the present case, the libelant has shown his insistence upon legal rights, by trying to force this case in the courts, in spite of his solemn promise to arbitrate every matter in dispute, and he should not complain of the enforcement of a clause in the contract which limits the recovery to the amount of freight.

If we read this clause as a business man would, do we not know that there is no ambiguity in it; that it clearly provides that proven damages shall be recovered, not exceeding the estimated amount of freight?

**LAST POINT.**

**The decree of the Circuit Court of Appeals in favor of the libelant should be reversed and the case remanded to the District Court to enter judgment for the respondent dismissing the libel, with costs.**

February 18, 1920.

Respectfully submitted,

HAIGHT, SANDFORD, SMITH & GRIFFIN,  
Proctors for Petitioner.

CLARENCE BISHOP SMITH,  
Counsel.

## APPENDIX.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK C. CLARK,  
Plaintiff,

against

HAMBURG-AMERICAN PACKET  
COMPANY,  
Defendant.

WARD, J.

The stipulation in the charter party that all disputes were to be settled by unnamed arbitrators in London was not a provision regulating the remedy incidental to the contract, but was a substantive part of the contract itself. If the charter had been made in New York such a provision would not be valid, *Delaware & Hudson Canal Co. v. Penna. Coal Co.*, 50 N. Y., 250. But the demurrer admits that the charter was made in Germany between a German corporation and a citizen of the State of New York, and that the provision as to arbitration is valid by the law of Germany. The principal dispute is whether the defendant should have supplied a la carte dinners, as distinguished from table d'hote dinners. If this was a breach of the contract it was a breach committed on the ship, which is a part of German territory and generally while on the high seas. Arbitration of particular

controversies is recognized under certain conditions in New York, Code of Civil Proc., Secs. 2365-2386. I think this provision in the contract is a good plea in bar to an action in the courts of this state, *Hamlyn v. Talisker* (1894), App. Cas. 202. The demurrer is overruled with costs.

April 15, 1913.

*U. S. J.*

